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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1969.

No. 1477.

GLEN ALDEN CORPORATION, MESHULAM RIKLIS, DOROTHY H. AND LEWIS ROSENSTIEL FOUNDATION, R. G. SMITH, E. R. DEUTSCHE, D. D. BUSCHER, H. S. FELDMAN, SYLVAN OESTREICHER, J. L. MORRIS, THEODORE GOMMI, D. A. CHERNOW, W. E. DEVEREAUX, BERNARD GOLDBERG, G. D. KUHN, L. B. NICHOLS, JOHN MACKIE AND THEODORE C. WIEHE,

Petitioners,

v.

ALEXANDER KAHAN, On behalf of himself and all others similarly situated,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent hereby prays that this Court deny petitioners' request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on February 20, 1970.

OPINIONS BELOW.

The opinions of the Court of Appeals are not yet officially reported and are printed in Appendix B of the Petition, pp. A6-29. The opinion of the District Court is reported at 300 F. Supp. 447 (D. Del. 1969) and is printed in Appendix D of the Petition, pp. A32-40.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

Respondent commenced this class action under Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act") and Rule 10b-5 promulgated thereunder. After diligently pursuing his action, petitioners complied with all of respondent's demands by settling directly with the class represented by him. However, in settling with respondent's class, petitioners ignored the plain language, policy and purpose of Rule 23(c) and (e) and failed to submit their compromise to any court for its approval. Because petitioners had prevented judicial supervision of the fund out of which respondent's counsel fees would have been paid by settling directly with the class, respondent filed a petition for counsel fees requesting their assessment against petitioners.

The District Court dismissed respondent's amended complaint and petition for counsel fees on the grounds that: (1) the amended complaint failed to state a cause of action and was moot; and (2) respondent could not recover counsel fees from any of the petitioners under any circumstances. The Court of Appeals reversed, holding that respondent had stated a meritorious cause of action for injunctive relief and that he should have been accorded the opportunity to prove the causal connection between his suit and petitioners' settlement in violation of Rule 23(c) and (e).

Thus, the questions presented are:

1. May respondent recover counsel fees from petitioners, who ignored Rule 23(c) and (e) and settled directly with the class represented by respondent without the approval or supervision of any court, thereby making it impossible for counsel fees to be paid out of the fund created by respondent's efforts?

2. Did Rule 23 as amended prohibit petitioners from making an out-of-court settlement resulting in dismissal of a class action without either court approval or notice to the class?

3. Did respondent's amended complaint state a cause of action for injunctive relief under Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder even though at the time of filing said amended complaint respondent was neither a purchaser nor a seller of securities, since this Court has held in *SEC v. Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 193 (1963) that "[i]t is not necessary in a suit for equitable or prophylactic relief to establish all the elements required in a suit for monetary damages," and since it is clear that petitioners complied with respondent's demands *in limine* before any damage actually could be inflicted?

STATUTES AND RULES INVOLVED.

The provisions involved are Section 10(b) of the 1934 Act (15 U. S. C. § 78j(b)), Rule 10b-5 promulgated thereunder (17 C. F. R. § 240.10b-5) and Rule 23 of the Federal Rules of Civil Procedure. The aforesaid statute and rules are printed in Appendix A of the Petition, pp. A1-5.

COUNTERSTATEMENT OF THE CASE.

The statement of the case is succinctly set forth in the opinion of the Court of Appeals (Petition A7-10):

> "Plaintiff is a minority shareholder (owner of 750 shares) in Schenley Industries, a Delaware corporation. Defendants, in this proceeding and in the underlying suit, are the directors of Schenley at the time of the transaction alleged, including Lewis S. Rosenstiel, the controlling shareholder, the Dorothy H. & Lewis S. Rosenstiel Foundations alleged to be dominated and controlled by Rosenstiel and to be his "alter ego", Glen Alden Corporation, the tender offeror, and Meshulam Riklis, the controlling shareholder of Glen Alden.
>
> "In March, 1967, Schenley and P. Lorillard Company were engaged in negotiations for a merger between the two companies. As a condition of the merger, Rosenstiel, Schenley's chairman and chief executive officer, demanded a premium for his stock and the stock he controlled. Because Lorillard refused to pay the premium, negotiations terminated with Lorillard, and commenced with Glen Alden which was willing to meet Rosenstiel's terms. In March, 1968, as a result of these talks and as part of a plan by Glen Alden to acquire control of or merge with Schenley, Rosenstiel sold 945,126 shares of Schenley common stock to Glen Alden for $80 per share, making Glen Alden the controlling shareholder of Schenley. This occurred although Lorillard's proposed overall offer to every shareholder of Schenley common stock was better than the offer to be made by Glen Alden to the other Schenley shareholders, and despite the fact that other corporations were ready and willing to make better overall offers to Schenley common stockholders.

"Contemporaneously with Glen Alden's purchase of Rosenstiel's shares, it was publicly announced through various financial and news media that a tender offer by Glen Alden would be made to Schenley shareholders which would be equivalent to the $80 per share paid to Rosenstiel. This offer was to consist of $20 in cash, a six percent twenty-year subordinated debenture in the principal amount of $60, and three warrants to purchase Glen Alden's common stock at $15 per share for each share of Schenley common stock.

"Plaintiff concluded that the value of this proposed offer had been misrepresented in that it was not equal to the sum paid to Rosenstiel for the shares controlled by him. He filed a class action in the District Court of Delaware on behalf of all Schenley common shareholders at the time of the alleged transaction except for those involved in it, and also filed a suit in the Delaware Court of Chancery. These actions charged defendants with violating § 10(b) of the 1934 Securities Exchange Act and Rule 10b-5, and with a breach of fiduciary duties.[2] The principal charges in the suit filed in the Delaware District Court were:

(1) Defendants' representations that the originally announced offer was equal or comparable to the $80 per share paid Rosenstiel were materially false and misleading; and

(2) Defendants' representations omitted the material fact that plaintiff and each member of his

"2. Plaintiff also sued in the United States District Court for the Southern District of New York, and the New York Supreme Court. In addition to the four actions commenced by this plaintiff, five largely similar actions, all allegedly class actions, were commenced by other plaintiffs in three different courts.

class had been deprived of the opportunity to effect a more favorable disposition of their shares to Lorillard or to other corporations.

"Plaintiff further alleged that as a result of this legal action and the efforts of his counsel, Glen Alden publicly announced in April, 1968, it would increase its offer. The new offer included $10 in cash and a six percent twenty-year subordinated debenture in the principal amount of $100. Although this represented a $17 increase over the original offer, plaintiff contended it was still not equal to the $80 per share paid to Rosenstiel and filed an amended complaint. In August, 1968, the offer was raised to include $13 in cash and a six percent sinking fund, twenty-year subordinated debenture in the principal amount of $100 for each 1.5 shares of Schenley common stock,[3]—admittedly, three dollars more than the previous offer. The package included in the second revision was comparable to the $80 paid to Rosenstiel and to the offer made by Lorillard. Because defendant, Glen Alden, made these offers directly to the individual stockholders, plaintiff alleges that Glen Alden violated the provision of Rule 23(e) of the Federal Rules of Civil Procedure providing for formal class settlements. Plaintiff also alleges that through his efforts a fund of approximately $83,000,000 was created for the benefit of the class he represented. This sum is the difference between the value of the original offer and the final tender offer.[4]

"3. The final revised tender offer was made subsequent to a three for two stock split of the Schenley stock.

"4. According to the pleadings, this is computed by multiplying the 4,150,000 shares of Schenley stock not controlled by Rosenstiel, prior to the stock split, by $20. The exact number of Schenley shares not controlled by Rosenstiel prior to the stock split was 4,180,874.

"On February 20, 1969, plaintiff filed a petition for counsel fees, costs and expenses; and the defendants promptly moved to dismiss both the complaint and the petition. Hearing was held on April 25, 1969, and on June 10th, Chief Judge Wright filed an opinion in support of his order dismissing plaintiff's petition. An order dismissing the complaint as moot was entered on July 8, 1969. Plaintiff then appealed the dismissal of his petition."

In reversing the District Court, the Court of Appeals held that: (1) respondent had stated a cause of action for injunctive relief under Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder; and (2) respondent should have been accorded the opportunity to prove the causal connection between his efforts and petitioners' settlement.

REASONS FOR DENYING THE WRIT.

A. The Decision of the Court of Appeals Permitting Respondent to Assert a Claim for Counsel Fees Against Petitioners Is Not in Conflict With Any Decision of Any Court and Does Not Present Any Question Which Should Be Resolved by This Court.

Consistent with *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375 (1970), the Court of Appeals held that in exceptional circumstances, where an adverse party has engaged in conduct which is unconscionable, fraudulent, willful or in bad faith, a court of equity would have the power to assess attorneys' fees against such adverse party in order to do justice between the parties (Petition A13-15). Relying upon *Sprague v. Ticonic Natl. Bank*, 307 U. S. 161, 166 (1939), this Court in *Mills* recognized that the foundation for the historic power of granting reimbursement of counsel fees rested in the inherent power of a court of equity. 375 U. S. at 392-393. Indeed, there are a legion of cases sanctioning the assessment of counsel fees against defendants in exceptional cases. *Vaughan v. Atkinson*, 369 U. S. 527, 530-531 (1962); *Universal Oil Products Co. v. Root Refining Co.*, 328 U. S. 575, 580 (1946); *Hill v. Franklin County Board of Education*, 390 F. 2d 583, 585 (6th Cir. 1968); *Bell v. School Board of Powhatan County*, 321 F. 2d 494, 500 (4th Cir. 1963) (*en banc*); *Rolax v. Atlantic Coast Line R. R. Co.*, 186 F. 2d 473, 481 (4th Cir. 1951); *In re Carico*, 308 F. Supp 815, 817 (E. D. Va. 1970).

As the Court of Appeals recognized (Petition A14-15), in *Taussig v. Wellington Fund, Inc.*, 187 F. Supp. 179 (D. Del. 1960) *aff'd* 313 F. 2d 472 (3d Cir. 1963) *cert. denied* 374 U. S. 806 (1963), the District Judge who dismissed respondent's petition for counsel fees herein permitted an

award of counsel fees in favor of the plaintiffs and *against the defendants therein*, holding that "[a]bsent a statutory provision, an equity court is not deprived of its inherent power to award attorney's fees to the prevailing party where the circumstances warrant," *i.e.*, where the "wrongdoers' actions were unconscionable, fraudulent, willful, in bad faith, vexatious or exceptional." 187 F. Supp. at 222-223. Despite the fact that *Taussig* involved a derivative suit by a minority shareholder and despite the fact that the benefited party was Wellington Fund, Inc., the nominal defendant on whose behalf the action was brought, counsel fees were assessed against defendants Wellington Company and Wellington Ltd., the actual losers in the litigation (187 F. Supp. at 223):

> "It would be unconscionable for Wellington Fund to be saddled with plaintiffs' attorney's fees in view of the conduct of its president and directors. Similarly, to assess part of these expenses against the innocent shareholders of Wellington Equity Fund would not be in keeping with equitable principles. . . .
>
> "Defendants, Wellington Company and Wellington, Ltd. are the proper defendants to bear these costs. They stood the most to gain by conferring on Wellington Equity Fund the purported right to use the 'Wellington' name. Exceptional circumstances appear in the present record to warrant the imposition of plaintiffs' attorney's fees against the designated defendants."

In like manner, the defendants here who stood the most to gain from the original misrepresentations were petitioners Glen Alden, Riklis, Rosenstiel, Rosenstiel's Foundation, and the director defendants of Schenley. Since petitioners settled with respondent's class by brazenly ignoring Rule 23(c) and (e), they should not be permitted

to deprive respondent of his counsel fees and, conversely, they should be required to restore him to the position in which he would have been had a formal class settlement and dismissal occurred as required by Rule 23(c) and (e).

In *Mills*, this Court held that where a fund or a benefit was created either for a class of shareholders or for their corporation, either the shareholders or the corporation should reimburse the attorneys responsible for the creation of said fund or benefit. 396 U. S. at 392-397. In the unusual facts of the current case, petitioners affirmatively prevented the creation of a fund supervised by a court from which attorneys' fees could have been awarded to respondent by settling directly with respondent's class in flagrant disregard of the plain language, policy and purpose of Rule 23(c) and (e). Accordingly, the Court of Appeals held that counsel fees could be assessed against petitioners and in favor of respondent if a causal connection in fact existed between the settlement and respondent's suit (Petition A17).

None of the cases cited by petitioners, including *Jones v. Uris Sales Corporation*, 373 F. 2d 644 (2d Cir. 1967) [1] and *Ballwanz v. Jarka Corporation of Baltimore*, 382 F. 2d 433 (4th Cir. 1967), are apposite to the case at bar since none of them involved a flagrant disregard of Rule 23 which prevented court supervision of the fund from which counsel fees would have been awarded to respondent. Simply stated, petitioners' actions herein made it impossible for respondent to obtain counsel fees from the fund created through his efforts. As the Court of Appeals recognized (Petition A10), sanctioning such conduct would effectively discourage prophylactic securities actions.[2]

1. In *Uris Sales*, the fund created by plaintiff's litigation was before the court and subject to an award of counsel fees.

2. See, *e.g.*, *Blau v. Rayette-Faberge, Inc.*, 389 F. 2d 460, 472-473 (2d Cir. 1968); *Smolowe v. Delendo Corp.*, 136 F. 2d 231, 241 (2d Cir. 1943).

Thus, the Court of Appeals has reinforced the holding of this Court in *Mills* by discouraging defendants from settling class actions without the consent and supervision of the court. This does not grant to plaintiffs a veto power over corporate action, but does encourage, as it should, strict adherence to *judicial* superintendence of settlements embraced by Rule 23(c) and (e). In short, any veto power is lodged where it should be, namely, in the hands of the court conducting the hearings pursuant to Rule 23(c) and (e).

B. The Court of Appeals Holding With Respect to Rule 23 of the Federal Rules of Civil Procedure as Amended Is Not in Conflict With Any Decision of Any Court of Appeals and Is Correct.

In an attempt to manufacture a conflict where none exists, petitioners have now focused on one isolated case not even cited by them to the Court of Appeals, *Wolf v. Barkes*, 348 F. 2d 994 (2d Cir. 1965) *cert. denied* 382 U. S. 941 (1965), which was decided before the amendment of Rule 23 in 1966.[3]

In adopting new Rule 23 in 1966, the entire framework of old Rule 23 was altered. For instance, paragraph (c) of new Rule 23 was added to the framework of the old rule. Thus, the significance of paragraph (e) of new Rule 23 can only be appreciated by juxtaposing it with paragraph (c) of new Rule 23. All of the courts which have construed new Rule 23(e) since the adoption of paragraph (c) have held that in the interim between the commencement of the suit as a class action and the judicial determination required

3. Indicative of its irrelevance is the fact that no other court, either before or after amendment of Rule 23, has followed or relied upon the holdings of *Wolf v. Barkes* which petitioners now proffer to this Court.

under paragraph (c)(1) regarding the maintenance of said suit as a class action, all parties and the Court must treat the matter as a class action for purposes of dismissal or compromise pursuant to Rule 23(e) (Petition A17). *Gaddis v. Wyman,* 304 F. Supp. 713, 715 (S. D. N. Y. 1969); *Philadelphia Electric Co. v. Anaconda American Brass Co.,* 42 F. R. D. 324, 326 (E. D. Pa. 1967); see also 3B *Moore's Federal Practice* ¶ 23.50, p. 23-1103 (2d Ed. 1969).

Moreover, the Second Circuit in *Wolf v. Barkes* placed great emphasis on the fact that "[n]o one has sought to dismiss or compromise the class suit" and, therefore, prejudice to any shareholders arising from the *partial* settlement was nonexistent. 348 F. 2d at 996-997. In the instant action, petitioners sought to dismiss respondent's amended complaint as well as his petition for counsel fees, and both were in fact dismissed by the District Court.

Finally, the Court in *Wolf v. Barkes,* expressly disclaimed any ruling regarding plaintiff's right to attorneys' fees if "the suit was in some degree responsible for the settlement." 348 F. 2d at 997, fn. 3.

In an attempt to overcome the unanimity of authority supporting respondent's position, petitioners contend that the decision of the Court of Appeals will be used to harass corporations and their shareholders. However, it is clear that petitioners' *in terrorem* approach is totally without merit. Obviously, it is the function of the judiciary under new Rule 23(e) to ascertain the nature and determine the propriety of any settlement proposed by any defendant to any shareholders represented under Rule 23 by any plaintiff. *Only through judicial supervision of a class action settlement can shareholders be properly protected.*

In the current case, petitioners made a tender offer to the shareholders of Schenley represented by respondent, which finally conformed with their original representation

that it was equal or comparable to $80 per share. As a result of the unsupervised and unscrutinized tender offer, respondent's action on behalf of the Schenley shareholders was dismissed. Sanction of such a prejudicial action, without notice to the class, is clearly untenable, 3B *Moore's Federal Practice* ¶ 23.80[2], p. 23-1503 and ¶ 23.80[2.-1], p. 23-1506 (2d Ed. 1969), particularly since several courts have held that the effectiveness of the Section 10(b) remedies depends in large measure on the applicability of the class action mechanism of new Rule 23. See, *e.g., Green v. Wolf Corp.*, 406 F. 2d 291, 298, 301 (2d Cir. 1968) *cert. denied* 395 U. S. 977 (1969) and *Esplin v. Hirschi*, 402 F. 2d 94, 99, 101 (10th Cir. 1968) *cert. denied* 394 U. S. 928 (1969).

C. The Court of Appeals Holding That Respondent's Amended Complaint States a Cause of Action for Injunctive Relief Under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 Promulgated Thereunder Is Not in Conflict With Any Decision of Any Court of Appeals and Follows the Holding of This Court in SEC v. Capital Gains Research Bureau, Inc.

Since the Court of Appeals did *not* hold that respondent's amended complaint stated a cause of action for *damages* under Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder, its decision is not in conflict with any other decision of any Court of Appeals which has held that the purchaser-seller requirement is a prerequisite to such damage actions. See, *e.g., Iroquois Industries v. Syracuse China Corp.*, 417 F. 2d 963 (2d Cir. 1969); *Greenstein v. Paul*, 400 F. 2d 580 (2d Cir. 1968); *Birnbaum v. Newport Steel Corp.*, 193 F. 2d 461 (2d Cir. 1951) *cert. denied* 343 U. S. 956 (1952). To the contrary, the Court of Appeals expressly distinguished such cases (Petition A20).

On the other hand, the Court of Appeals did hold that the purchaser-seller requirement was not a prerequisite to an action commenced under Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder where injunctive relief was requested or where the complaint could be treated as requesting injunctive relief (Petition A20-27).[4] See, *e.g.*, *Crane Co. v. Westinghouse Air Brake Co.*, 419 F. 2d 787, 798 (2d Cir. 1969); *Britt v. The Cyril Bath Co.*, 417 F. 2d 433, 436 (6th Cir. 1969); *SEC v. Texas Gulf Sulphur Co.*, 401 F. 2d 833, 863, 868 (2d Cir. 1968) (*en banc*) *cert. denied sub nom. Coates v. SEC*, 394 U. S. 976 (1969); *Mutual Shares Corp. v. Genesco, Inc.*, 384 F. 2d 540, 546-547 (2d Cir. 1967).[5] This holding was expressly based on this Court's holding in *SEC v. Capital Gains Research Bureau, Inc.*, 375 U. S. at 193, that "[i]t is not necessary in a suit for equitable or prophylactic relief to establish all the elements required in a suit for monetary damages" (Petition A24-25).

The necessity for dispensing with the purchaser-seller requirement in the injunctive context is vividly revealed by the facts of the case at bar. Respondent's amended complaint was based, *inter alia*, on the fact that petitioners misrepresented the value of the tender offer which they intended to make to the shareholders of Schenley. In order to prevent the shareholders of Schenley from accepting said tender offer, which was represented to be worth $80 but in fact was worth only $60, respondent commenced his action. To require a sale or a purchase of securities where the entire object of the prophylactic action is the interdiction of the proposed sale or purchase would render

4. As the Court of Appeals recognized, respondent's amended complaint could not be dismissed for failing to request injunctive relief since facts constituting a cause of action for injunctive relief were alleged (Petition A26-27).

5. It should be noted that the Second Circuit which decided *Birnbaum* has departed from its holding and relaxed its requirements in *injunctive actions* such as *Crane, Texas Gulf Sulphur* and *Mutual Shares*.

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the commencement of such an action impossible.[6] In order to encourage private enforcement of the 1934 Act through equitable actions, Courts of Appeals, commencing with *Mutual Shares, Texas Gulf Sulphur, Britt* and *Crane* and culminating herein, have followed the direction of this Court in *Capital Gains.*[7]

Petitioners can cite only two decisions which they erroneously contend conflict with this consistent course of authority. Both cases are inapposite. *Greater Iowa Corp. v. McLendon,* 378 F. 2d 783 (8th Cir. 1967) simply held that the plaintiffs there had no standing under Section 10(b) of the 1934 Act because they were "neither *investors* or purchasers or sellers of the security in question." 378 F. 2d at 791. (Emphasis supplied.) Accordingly, they were not entitled to the protection of Section 10(b) of the 1934 Act. In the instant action, of course, respondent and the class represented by him, as shareholders of Schenley, were **investors.**

The so-called holding of the Seventh Circuit in *Jachimiec v. Schenley Industries, Inc.,* No. 15027 (1965) *cert. denied* 382 U. S. 841 (1965) is nothing more than an order which does not discuss in any respect the holding of this Court in *Capital Gains* or its progeny.[8] Since the Court in *Jachimiec* relied upon the decision in *Birnbaum,* which was subsequently distinguished by the Second Circuit itself in *injunctive actions* such as *Mutual Shares, Texas Gulf Sulphur* and *Crane,* this case clearly presents no conflict.

6. Injunctive actions provide complete and comprehensive relief *before* the infliction of damage, whereas a damage action after the event is subject to numerous uncertainties. *Electronic Specialty Co. v. Intl. Controls Corp.,* 409 F. 2d 937, 947 (2d Cir. 1969).

7. It is axiomatic that private parties may sue for equitable relief under the 1934 Act to enforce any liability or duty created thereunder. *J. I. Case Co. v. Borak,* 377 U. S. 426, 432-434 (1964); cf. *Deckert v. Independence Shares Corp.,* 311 U. S. 282, 287-288 (1940).

8. The order of the Seventh Circuit in *Jachimiec* entered upon an *emergency motion* is printed herein in Appendix A, pp. 17-18.

Finally, it is impossible to determine from a reading of the *Jachimiec* order that plaintiffs lacked standing because they were neither purchasers nor sellers.

CONCLUSION.

Petitioners should not be permitted to distort the holding of the Court of Appeals through speculative and strained suggestions of corporate chaos. Quoting from this Court's holding in *Mills,* 396 U. S. at 396, the Court of Appeals stated that "regardless of the relief granted, private stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute" (Petition A11). For these and the foregoing reasons, it is respectfully submitted that this Court should deny the petition for a writ of certiorari to review the judgment of the Court Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois
February 26, 1965

No. 15027

Before
Hon. JOHN S. HASTINGS, Chief Judge
Hon. WIN G. KNOCH, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge

STANLEY JACHIMIEC, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED SHAREHOLDERS,
Plaintiff-Appellee,

v.

SCHENLEY INDUSTRIES, INC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

This appeal having come on for consideration on the briefs and arguments filed herein by the respective parties and upon the oral arguments of counsel made before the Court on February 25, 1965; and upon the emergency motion of plaintiff-appellee to clarify the record on appeal,

or, in the alternative, to grant leave to the trial court to clarify its order herein, and the response of defendant-appellant, Schenley Industries, Inc., thereto, which motion was taken with the case on the merits:

And it appearing to the Court that:

(1) The order appealed from is a preliminary injunction;

(2) Plaintiff-appellee, Stanley Jachimiec, prosecutes this action as a class suit on behalf of himself and all other shareholders of the defendant-appellant, similarly situated;

(3) Plaintiff-appellee and other shareholders similarly situated have no standing to maintain such suit under Section 10(b) of the Securities Exchange Act or Rule 10(b)-5 promulgated thereunder (Birnbaum v. Newport Steel Corp., 2 Cir., 193 F. 2d 461);

(4) Neither the matters and things alleged in the complaint of the plaintiff-appellee, or disclosed by the record herein, are or tend to show any violation of said Act or Rule 10(b)-5; and

(5) Count 1 of said complaint fails to set forth a claim with respect to which the District Court has jurisdiction or upon which a preliminary injunction may be predicated;

It Is Therefore Ordered that the motion of plaintiff-appellee to clarify the record on appeal, or, in the alternative, to grant leave to the trial court to clarify its order, is denied;

And, It Is Further Ordered that the order appealed from is reversed, the preliminary injunction granted by the District Court is vacated and dissolved, and the cause is remanded to the District Court with directions to dismiss Count I of plaintiff's complaint.

Certificate of Service.

I hereby certify that on this 22nd day of May, 1970, five copies of the Brief for Respondent in Opposition were sent, postage prepaid, first class mail, to each of the following attorneys:

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I further certify that all parties required to be served have been served.

/s/ Bruce W. Kauffman,
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